A

UDA HOLDINGS BHD

v.

KOPERASI PASARAYA MALAYSIA BHD & OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA

C [CIVIL APPEAL NOS: W-02-735-2006, W-02-653-2006 & W-01-79-2006]
26 JULY 2007

D ***TORT:*** *Nuisance - Public nuisance - Closure of road - Whether users of road affected - Whether customers of supermarket using road to access supermarket inconvenienced - Whether supermarket's business adversely affected - Whether special damages proved*

E ***TORT:*** *Breach of statutory duty - Closure of road - Failure to maintain road as public street - Failure to remove obstruction and instead barricaded road - Whether in contravention of ss. 12 and 46 Street, Drainage and Building Act 1976 - Whether temporary occupation licence issued by land administrator provided defence*

F ***LOCAL GOVERNMENT:*** *Licence - Issuance of temporary occupation licence - Whether validly issued in respect of public road - National Land Code, ss. 42(2), 65, 66*

G There were three appeals against the decision of the trial judge before the court. The first appeal was by Urban Development Authority ('UDA'), whilst the second and third appeals were from Dewan Bandaraya Kuala Lumpur ('DBKL') and the Government of Malaysia respectively. The facts showed that the respondent was a co-operative society operating a supermarket with customers mainly from its members consisting of about 6000 individual H members and 50 co-operative societies. The products sold at the supermarket were essentially foodstuff and household goods. The main entrance to the supermarket was a road where 35 parking bays were located. That road proved to be very convenient to the customers of the respondent's supermarket for purposes of loading I and unloading passengers and goods to their vehicles. DBKL acting in concert with UDA and the Land Administrator, an officer of the Government of Malaysia caused a portion of that road

('the said road') to be closed to all traffic. Subsequently, UDA constructed 76 stalls at the said road. The purpose of that exercise was to relocate unlicensed hawkers who had earlier occupied a piece of land owned by UDA in which UDA intended to construct a multi-storey building ('the said building'). The closure of the said road was supposedly for a period of two years. However, it was only re-opened to public after a period of five years. In the interim period, the respondent's supermarket business suffered badly. After the said road was re-opened, the respondent sold its premises with a right to rent it back and later re-opened its business at a monthly rent of RM60,676. The respondent then brought an action against the appellants for public nuisance and breach of statutory duties and succeeded in its claim for damages in the sum of RM23,743,157 with interest. Hence, the appeals herein.

Held (dismissing appeal against liability unanimously, dismissing appeal against quantum by majority):
Per James Foong JCA (differing on issue of quantum only):

(1) UDA Holdings, DBKL and the Government of Malaysia were liable under the cause of action for public nuisance (concurring with reasons given by Low Hop Bing JCA). However, public policy demanded that DBKL be exempted from liability for pure economic loss. Since UDA was not a public body, the protection offered to DBKL did not apply to UDA Holdings. UDA Holdings was therefore liable to the respondent for public nuisance. (paras 5 & 6)

(2) In respect of breach of statutory duty, apart from DBKL, the Government of Malaysia was also liable to the respondent. That was caused by the act of the Land Administrator, a servant or agent of the latter in issuing the Temporary Occupation Licence ('TOL') to a public road and for the purpose of erecting the stalls thereon. That was contrary to the National Land Code and the Road Transport Act 1987. Breach of statutory duty was also committed by a servant and/or agent of the Government of Malaysia in the person of the Secretary General of the Ministry of Local Government and Housing. He approved the construction of the stalls and issued a certificate of inspection for them after they were constructed. On that

cause of action for breach of statutory duty, public policy did not exempt either DBKL or the Government of Malaysia from a claim based on pure economic loss. (para 7)

(3) The respondent's average past profit for six years prior to the closure of the said road was taken before tax. With the admission of the actuary who was the principal proponent of the respondent's claim that the said profit should have been taken after tax and not before tax, adjustments should be made accordingly. (para 14)

(4) A write-off of RM992,245 for fixed assets of the respondent's Kulim and Kangar supermarket branches found in the respondent's account for the year 2000 had nothing to do with the closure of the said road. As such, the amount should be deducted in calculating future business loss of the respondent. Also, loss caused by the sale of Amanah Saham in Perwira Affin Bank amounting to RM609,504 had nothing to do with the closure of the said road. That, too, should be deducted accordingly. (para 14)

(5) The emergence and invasion of the hypermarkets would have contributed to the respondent's losses and therefore an appropriate deduction ought to be made on the amount claimed by the respondent. (para 14)

(6) In the profit and loss accounts tendered by the respondent the item allocated to rental must be for the return on the respondent's own fixed asset, ie, the said premises which belonged to them. As that property was its own, such amount could be listed as rental in the respondent's operating cost for the running of the supermarket. When rental had been accounted as an item in the operating cost and the amount claimed for the loss of business was allowed based on such account, then claiming payment of rental separately once again would be making a claim for the same item twice. That was because rental for the said premises had been duly considered when compensating the respondent for the loss of the business. (para 24)

(7) The amount of RM5,000,000 for loss of business in any event ought to be dismissed as it was arrived at without any cogent evidence to convince the court. (para 35)

(8) The respondent's claim for only the following should be allowed, *ie*, loss of business (RM5,263,804), loss suffered as a result of the sale of the said premises (RM 1,078,000) and loss of goodwill (RM1,811,000), thereby resulting in a total of RM8,152,804. (para 36)

Per Low Hop Bing JCA (Suriyadi Halim Omar JCA concurring):

(1) The concerted acts of the three appellants culminating in the closure of the said road in a busy commercial area for more than five years clearly inflicted damage, injury or inconvenience on the users of the said road, the customers of the respondent generally and the respondent specially. Such acts constituted public nuisance. (para 74)

(2) The public nuisance collectively caused by the three appellants was actionable at the instance of the respondent whose right of suit was independent of s. 8(1) of the Government Proceedings Act 1956. The concerted acts of the three appellants had inflicted on the respondent special damage not merely in degree but also different in kind in the exercise or enjoyment of its rights and convenience. Such special damage was over and above that suffered by members of the public generally as users of the said road and customers of the respondent. In the circumstances, the respondent had succeeded in proving public nuisance on a balance of probabilities against the appellants as correctly found by the trial judge. (para 77)

(3) DBKL's failure to maintain the road as a public street was clearly demonstrated by it barricading the said road and allowing UDA to erect the 76 stalls thereon. The result of the barricade was the obstruction caused by DBKL to the said road. The powers conferred on DBKL by s. 46(3)(a) of the Street, Drainage and Building Act 1974 to remove the obstruction or cause it to be removed were coupled with a duty to effect the removal thereof. DBKL's omission to do so constituted a breach of statutory duty. Failure to maintain the said road as a public street under s. 12 of the same Act was another illustration of such breach by DBKL against which a remedy would lie. The injury the respondent had suffered, *ie*, the eventual collapse of its business was consequent upon DBKL's breach of the statutory duties

A expressed in ss. 12 and 46. Although ss. 12 and 46 did not expressly impose a civil remedy for such breaches, there was a presumption that the respondent as the party injured thereby would have a right of action. (paras 86, 87 & 88)

B **(4)** The TOL was issued in respect of a public road heavily used by members of the public and the occupiers of the buildings along the said road. The TOL could not override or interfere with their daily right or enjoyment in the use of the said road. It could not simply disregard the hardship caused to C users of the said road generally and the respondent specially. (para 94)

(5) The Land Administrator issued the TOL to enable DBKL to barricade the said road and to facilitate the erection of the 76 stalls by UDA. DBKL and the Land Administrator as an D officer of the Government of Malaysia had effectively disregarded the rights of the users of the said road generally and the respondent specially. The TOL did not clothe the appellants with a *carte blanche* licence or defence to cause, create or bring about public nuisance or breach of statutory E duties. (para 95)

(6) The respondent's business depended wholly and exclusively on the customers who were used to parking their cars at the parking bays on the said road for the purpose of loading and F unloading foodstuff and household goods purchased from the respondent. The closure of the said road and the erection of the 76 stalls had put a halt to the flow of traffic and customers to the respondent. The lifeline of the respondent's business appeared to have been disconnected, not for two G years as originally contemplated by the appellants but for five years. The tremendous adverse effect on the respondent's business was plain and obvious. (para 101)

(7) Whilst the economic recession or financial crisis in the H nineties had brought about the collapse of untold business ventures, it was significant to observe that the essential foodstuff and household goods sold by the respondent were not luxury items. They constituted the daily and recurrent needs of 3500 customers drawn from its members consisting I of some 6000 individuals and 50 co-operative societies. The respondent had established that it was largely recession-proof during the economic crisis in 1985 when the said road was thoroughfare. (para 102)

(8) The emergence of several wholesale markets and hypermarkets were reflected in the respondent's annual reports that expressly stated that they were not considered as competitors. The sales and profits of the respondent remained substantially consistent due to the convenience that the respondent's customers enjoyed prior to the closure of the said road. (para 103)

(9) The alternative parking bays that were available at the hotel car park on the upper floor in the same building as the respondent were not attractive to its customers since the customers had to pay for the use of them. The customers were also deprived of the convenience and ability to load and unload the purchased items at the direct entrance to the respondent. (para 104)

(10) DBKL might rely on the majority judgment in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* to exclude liability from the respondent's claim for pure economic loss based on negligence and nuisance only. The majority judgment, however, did not provide DBKL with an insulation or immunization against liability for breach of statutory duties. (para 110)

(11) After selling the property the respondent had to pay a monthly rent to carry on its business at the same premises which expenditure the respondent did not incur before the closure of the said road. (para 125)

(12) Being a co-operative society, the respondent was a body corporate with perpetual succession. It had expected to carry on its business permanently. Prior to the closure of the said road, the respondent had never anticipated discontinuance of its business at any time. The respondent obtained the option to renew the lease and was committed to pay a further sum during the option period for five years. (para 127)

(13) There was no error in the award of damages by the trial judge. There was no justification for appellate interference except to observe that since UDA, DBKL and the Government of Malaysia were joint tortfeasors in public nuisance and additionally DBKL for breach of statutory duties, their liability should be apportioned equally. (para 133)

A ***Bahasa Malaysia*** *translation of headnotes*

Terdapat tiga rayuan terhadap keputusan hakim bicara di mahkamah ini. Rayuan pertama adalah oleh Urban Development Authority ('UDA'), sementara rayuan-rayuan kedua dan ketiga
B adalah masing-masing oleh Dewan Bandaraya Kuala Lumpur ('DBKL') dan Kerajaan Malaysia. Fakta menunjukkan bahawa responden adalah sebuah koperasi yang mengendalikan sebuah pasar raya dengan pelanggan-pelanggannya terdiri dari ahli-ahlinya sendiri, iaitu seramai lebih kurang 6000 ahli persendirian dan 50
C koperasi. Pada asasnya barangan yang dijual di pasar raya adalah barangan-barangan makanan dan keperluan rumah. Pintu utama kepada pasar raya adalah sebatang jalanraya di mana terdapat 35 tempat letak kereta di situ. Tidak dinafikan bahawa jalanraya tersebut memudahkan pelanggan-pelanggan pasar raya untuk
D mengangkut barangan atau mengambil penumpang-penumpang ke kenderaan mereka. DBKL, bertindak secara bersesama dengan UDA dan Pentadbir Tanah, seorang pegawai Kerajaan Malaysia, telah menyebabkan sebahagian dari jalanraya ('jalan tersebut') ditutup kepada semua lalulintas. Berikutnya, UDA membina 76
E gerai di jalan tersebut. Tujuannya adalah bagi mengalih peniaga-peniaga tidak berlesen yang sebelum itu menempati sebidang tanah milik UDA di mana UDA berhasrat untuk membina bangunan berbilang tingkat di atasnya ('bangunan tersebut'). Penutupan jalan tersebut dianggarkan untuk tempoh dua tahun. Bagaimanapun, ia
F hanya dibuka kepada orang awam lima tahun selepas itu. Sementara itu, perniagaan pasar raya responden telah jatuh merudum. Selepas jalan tersebut dibuka semula, responden menjual premisnya dengan hak untuk menyewanya semula pada kadar RM60,676 sebulan. Responden kemudian memulakan tindakan
G mendakwa perayu-perayu kerana kacau ganggu awam dan kemungkiran tanggungjawab statutori dan berjaya mendapat gantirugi berjumlah RM23,743,157 beserta dengan faedah. Ini mengakibatkan rayuan-rayuan di sini.

H **Diputuskan (menolak rayuan terhadap liabiliti dengan sebulat suara, menolak rayuan terhadap kuantum secara majoriti):**

Oleh James Foong JCA (berbeza atas isu kuantum sahaja):

I **(1)** UDA Holdings, DBKL dan Kerajaan Malaysia bertanggungan di bawah kausa tindakan kacau ganggu awam (bersetuju dengan alasan-alasan yang diberikan oleh Low Hop Bing HMR). Bagaimanapun, polisi awam menuntut bahawa DBKL

harus dikecualikan dari tanggungan bagi kerugian kewangan semata-mata. Oleh kerana UDA bukan merupakan sebuah badan awam, perlindungan yang diberi kepada DBKL tidak terpakai kepada UDA Holdings. UDA Holdings dengan itu bertanggungan kepada responden kerana kacau ganggu awam.

(2) Berhubung kemungkiran tanggungjawab statutori, selain dari DBKL, Kerajaan Malaysia juga bertanggungan kepada responden. Ini akibat dari perbuatan Pentadbir Tanah, seorang pekerja atau agennya yang mengeluarkan Lesen Menduduki Sementara ('TOL') kepada sebatang jalanraya awam bagi maksud membina gerai-gerai di situ. Itu adalah bertentangan dengan Kanun Tanah Negara dan Akta Pengangkutan Jalan 1987. Kemungkiran tanggungjawab statutori juga dilakukan oleh seorang lagi pekerja dan/atau agen Kerajaan Malaysia, iaitu Ketua Pengarah Kementerian Perumahan dan Kerajaan Tempatan. Beliau telah meluluskan pembinaan gerai-gerai dan mengeluarkan sijil pemeriksaan setelah gerai-gerai siap dibina. Berhubung kausa tindakan kemungkiran tanggungjawab statutori ini, polisi awam tidak mengecualikan sama ada DBKL mahupun Kerajaan Malaysia dari tuntutan yang berlandaskan kerugian kewangan semata-mata.

(3) Purata keuntungan responden bagi tempoh enam tahun sebelum penutupan jalan tersebut adalah keuntungan yang dikira sebelum cukai. Dengan pengakuan jurukira, yang merupakan proponen penting bagi tuntutan responden, bahawa keuntungan tersebut harus dikira selepas cukai dan bukannya sebelum cukai, maka pengubahsuaian yang sewajarnya hendaklah dibuat.

(4) Tolakan berjumlah RM992,245 bagi aset kekal cawangan-cawangan pasar raya responden di Kulim dan Kangar bagi akaun responden bagi tahun 2000 tidak ada kena mengena dengan penutupan jalan tersebut. Oleh itu, jumlah ini harus dipotong apabila mengira kerugian masa depan perniagaan responden. Selain itu, kerugian yang berbangkit dari penjualan Amanah Saham di dalam bank Perwira Affin berjumlah RM609,504 juga tidak ada kaitan dengan penutupan jalan tersebut. Itu juga harus dipotong sekadarnya.

(5) Kemunculan pasar raya-pasar raya hyper telah menyumbang kepada kerugian responden dan dengan itu potongan sewajarnya harus juga dibuat bagi jumlah yang dituntut responden.

(6) Dalam penyata untung rugi yang dikemukakan responden, item yang diambil sebagai sewa sepatutnya adalah hasil dari aset-aset kekal responden sendiri, iaitu premis tersebut yang dimiliki oleh mereka. Oleh kerana harta tersebut milik mereka, maka jumlah tersebut boleh disenarai sebagai sewa di dalam kos operasi responden dalam mengendalikan pasar raya. Apabila sewa dijadikan sebagai satu item di dalam kos operasi, dan jumlah tuntutan dibenarkan kerana kehilangan perniagaan bersandarkan kepada tanggungan tersebut, maka menuntut bayaran sewa secara berasingan sekali lagi samalah seperti membuat tuntutan dua kali untuk item yang sama. Ini kerana sewa bagi premis tersebut telah pun diambil kira semasa responden dipampas kerana kehilangan perniagaan.

(7) Walau apapun, jumlah RM5,000,000 kerana kehilangan perniagaan harus ditolak kerana ia dibuat tanpa apa-apa keterangan yang boleh meyakinkan mahkamah.

(8) Hanya tuntutan responden yang berikut sahaja harus dibenarkan, iaitu, kehilangan perniagaan (RM5,263,804), kerugian yang ditanggung kerana menjual premis tersebut (RM 1,078,000) dan kehilangan nama baik (RM1,811,000), sekaligus memberikan jumlah keseluruhan RM8,152,804.

Oleh Low Hop Bing HMR (Suriyadi Halim Omar HMR menyetujui):

(1) Tindakan secara bersesama ketiga-tiga perayu yang berakhir dengan penutupan jalan tersebut yang terletak di kawasan perniagaan yang sibuk untuk tempoh lebih dari lima tahun jelas telah menyebabkan kerugian, kecederaan atau ketidak-selesaan kepada pengguna-pengguna jalan tersebut, pelanggan-pelanggan responden amnya serta responden sendiri khususnya. Tindakan sedemikian adalah satu kacau ganggu awam.

(2) Kacau ganggu awam yang dilakukan ketiga-tiga perayu boleh diambil tindakan oleh responden kerana hak guaman responden adalah bebas dari s. 8(1) Akta Prosiding Kerajaan 1956. Tindakan bersesama ketiga-tiga perayu telah

mengakibatkan responden mengalamai kerugian khas bukan semata-mata dari segi darjahnya tetapi juga kerana ia bertentangan dengan haknya untuk menikmati keselesaan. Kerugian khas tersebut adalah lain dan berbeza dari yang dialami oleh orang awam amnya selaku pengguna jalan tersebut dan pelanggan responden. Oleh hal yang demikian, responden telah berjaya membuktikan kacau ganggu awam atas imbangan kebarangkalian terhadap perayu-perayu sepertimana yang dengan betulnya didapati oleh hakim bicara.

(3) Kegagalan DBKL memelihara jalan sebagai jalan awam dapat dilihat dengan jelas dari hadangan-hadangan yang diletaknya di atas jalan dan dalam tindakannya membenarkan UDA membina 76 gerai di situ. Dengan membuat hadangan, DBKL telah menyebabkan halangan kepada jalan. Kuasa-kuasa yang diberi kepada DBKL oleh s. 46(3)(a) Akta Jalan, Parit dan Bangunan 1974 untuk membuang halangan datang bersekali dengan kewajipan untuk menyempurnakan pembuangannya. Kegagalan DBKL berbuat demikian adalah satu pelanggaran terhadap tanggungjawab statutorinya. Kegagalan memelihara jalan tersebut sebagai satu jalan awam di bawah s. 12 Akta yang sama adalah satu lagi ilustrasi pelanggaran oleh DBKL terhadap mana remedi ada disediakan. Kecederaan yang dialami responden, iaitu kehancuran perniagaannya, adalah berpunca dari DBKL melanggar kewajipan statutorinya seperti yang dicatitkan ss. 12 dan 46. Walaupun ss. 12 dan 46 tidak secara terang mengenakan remedi sivil atas pelanggaran sedemikian, wujud anggapan bahawa responden, selaku pihak yang tercedera, berhak untuk mengambil tindakan.

(4) TOL dikeluarkan ke atas satu jalan awam yang sibuk digunakan oleh orang ramai dan oleh penghuni-penghuni bangunan di sepanjang jalan tersebut. TOL tersebut tidak boleh mengatasi atau mengganggu hak mereka untuk menggunakan jalan tersebut setiap hari. Ia tidak boleh dengan begitu sahaja tidak mengendahkan kesusahan yang diakibatkan kepada pengguna-pengguna jalan amnya dan responden khususnya.

(5) Pentadbir Tanah mengeluarkan TOL bagi membolehkan DBKL menghadang jalan dan untuk membolehkan pembinaan 76 gerai oleh UDA. DBKL dan Pentadbir Tanah, selaku seorang pegawai Kerajaan Malaysia, secara berkesannya tidak memperduli langsung hak-hak pengguna jalanraya amnya dan responden khususnya. TOL tidak memberikan lesen atau pembelaan *carte blanche* kepada perayu-perayu untuk menyebabkan, mencipta atau mengakibatkan kacau ganggu awam ataupun melanggar tanggungjawab statutori.

(6) Perniagaan responden bergantung sepenuhnya kepada pelanggan-pelanggan yang sudah terbiasa dengan meletakkan kereta-kereta mereka di tempat-tempat letak kereta di jalan tersebut bagi maksud memunggah atau menaikkan barangan-barangan makanan dan keperluan rumah yang dibeli dari responden. Penutupan jalan tersebut dan pembinaan 76 di situ telah menghentikan kedatangan kenderaan dan pelanggan ke tempat responden. Tali hayat perniagaan responden nampaknya telah diputuskan bukan untuk tempoh dua tahun seperti yang dijangka tetapi sehingga lima tahun. Penjejasan teruk kepada perniagaan responden adalah terang dan jelas.

(7) Sementara keruntuhan ekonomi dan krisis kewangan pada tahun-tahun sembilan puluhan telah memusnahkan perniagaan dengan tidak terkira banyaknya, adalah penting untuk memerhatikan bahawa barangan makanan dan keperluan rumah yang dijual oleh responden bukanlah barang-barang mewah. Barangan merupakan barang-barang yang diperlukan setiap hari oleh sekitar 3500 pelangan yang terdiri dari 6000 ahli-ahli perseorangan dan 50 persatuan koperasi. Responden telah membuktikan bahawa ia agak tidak terjejas oleh krisis ekonomi pada tahun 1985 bilamana jalan tersebut merupakan sebatang jalan raya.

(8) Kemunculan pasar raya-pasar raya borong dan hyper telah diambilkira oleh laporan-laporan tahunan responden yang menyatakan dengan jelas bahawa mereka tidak dianggap sebagai pesaing. Penjualan dan keuntungan responden masih kekal seperti biasa dan ini disebabkan keselesaan yang mereka dapat berikan kepada pelanggan-pelanggan mereka sebelum penutupan jalan tersebut.

(9) Tempat letak kereta alternatif yang disediakan di tempat letak kereta hotel di tingkat atas bangunan yang sama yang diduduki responden adalah tidak menarik kepada pelanggan-pelanggan yang terpaksa membayar untuk menggunakannya. Pelanggan-pelanggan juga tidak lagi dapat menurunkan atau menaikkan barangan yang dibeli dari responden dengan selesa di hadapan pasar raya responden.

(10) DBKL mungkin bergantung kepada keputusan majoriti di dalam *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* bagi menolak liabiliti terhadap tuntutan responden untuk kerugian kewangan semata-mata yang didasarkan hanya kepada kecuaian dan kacau ganggu. Namun, keputusan majoriti tersebut tidak memberikan DBKL apa-apa insulasi atau imunisasi terhadap kemungkiran tanggungjawab statutori.

(11) Selepas menjual hartanah, responden terpaksa membayar sewa bulanan bagi meneruskan perniagaannya di premis tersebut, pembiayaan mana tidak ditanggung oleh responden sebelum penutupan jalan tersebut.

(12) Sebagai sebuah persatuan koperasi, responden adalah sebuah perbadanan korporat yang mempunyai kewujudan kekal. Ia menjangka untuk menjalankan perniagaannya secara berterusan. Sebelum penutupan jalan tersebut, responden langsung tidak menjangka bahawa perniagaannya pada bila-bila masa pun akan terhenti. Responden memperoleh opsyen untuk menyambung pajakan dan telah mengikat untuk membayar jumlah tambahan untuk tempoh opsen selama lima tahun.

(13) Tiada kekhilafan pada award kerugian yang dibuat oleh hakim bicara. Tiada justifikasi untuk campur tangan rayuan kecuali untuk berkata bahawa oleh kerana UDA, DBKL dan Kerajaan Malaysia merupakan pelaku tort kacau ganggu awam secara bersama, dan DBKL pula secara sendirian bertanggungan kerana kemungkiran tanggungjawab statutori, maka liabiliti mereka harus diagihkan dengan sewajarnya.

Case(s) referred to:

Attorney-General (On the relation of Glamorgan County Council and Portardawe Rural District Council) v. P.Y.A. Quarries Ltd [1957] 1 All ER 894 ***(refd)***

Cutler v. Wandsworth Stadium Ltd [1949] AC 398 ***(refd)***

David v. Abdul Cader [1963] WLR 834 ***(refd)***

EON Bank Bhd v. Flamingo And Another Case [2005] 5 CLJ 253 HC ***(refd)***

Great Central Railway Co v. Hewlett [1916] 2 AC 511 ***(refd)***

Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Parimala Muthusamy v. Projek Lebuhraya Utara-Selatan [1997] 4 CLJ 54 HC ***(refd)***

Schacht v. The Queen in Right of the Province of Ontario [1972] 30 DLR (3d) 641 ***(refd)***

Syarikat Perniagaan United Aces Sdn Bhd & Ors v. Majlis Perbandaran Petaling Jaya [1996] 4 CLJ 301 FC ***(refd)***

Takong Tabari v. Government Of Sarawak & Ors [1995] 1 CLJ 403 HC ***(refd)***

Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC ***(refd)***

Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd [1995] 4 CLJ 670 HC ***(refd)***

Vasiliou v. Secretary of State for Transport and Another [1991] 2 All ER 77 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3

Evidence Act 1950, s. 101

Government Proceedings Act 1956, s. 8(1), (2)

Local Government Act 1976, s. 65

National Land Code, ss. 42(2), 65, 66

Street, Drainage and Building Act 1974, ss. 12(1), 46(1)(a), (3)(a)

Town and Country Planning Act 1971 [UK], s. 209

Other source(s) referred to:

Clerk & Lindsell on Torts, 16th edn, p 254, para 5-04

Halsbury's Laws of Malaysia, vol 5, pp 265-266 para 80.262

McGregor on Damages, 17th edn, para 4-001

(Civil Appeal No: W-02-735-2006)

For the appellant - Zainur Zakaria (Zulkifli Nordin with him); M/s Zulkifli Nordin & Assoc

For the respondent - A Kanesalingam (V Jeya Kumar & K Shanmuga with him); M/s Kanesalingam & Co

(Civil Appeal No: W-02-653-2006)
For the appellant - Romesh Abraham (T Sudhar with him); M/s Shook Lin & Bok
For the respondent - A Kanesalingam (V Jeya Kumar & K Shanmuga with him); M/s Kanesalingam & Co

(Civil Appeal No: W-01-79-2006)
For the appellant - Narkunavathy Sundareson SFC
For the respondent - A Kanesalingam (V Jeya Kumar & K Shanmuga with him); M/s Kanesalingam & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-21-153-1997]

Reported by Usha Thiagarajah

JUDGMENT

James Foong JCA:

Introduction

[1] There are three related appeals before us and they were heard together because they involved the same subject matter. For ease of reference, I shall refer to the appellant in appeal case no. W-02-735-2006 as UDA Holdings, in appeal case no. W-02-653-2006 as DBKL and in appeal case no. W-01-79-2006 as Government of Malaysia. After deliberation, we are of the unanimous opinion that the decision of the court below should be upheld in respect of liability. However we differ on the issue of quantum where Low Hop Bing JCA and Suriyadi bin Halim Omar JCA, by majority, agreed with the finding of the learned trial judge whilst I am of the view that it should be reduced. But before I proceed to give my reasons, it is necessary for me to reproduce the facts of this case with emphasis on certain dates and events which are pertinent to the issue of quantum.

Facts

[2] As to the basic facts of this case, I could not have put it more comprehensively than the learned trial judge in the following passages which I reproduce below. Reference made by the learned trial judge to the 1st defendant is UDA Holdings, 2nd defendant is DBKL and the 3rd defendant is the Government of Malaysia.

A At the commencement of this action in 1997 the Plaintiff was running a supermarket business (the said supermarket) at the ground floor of a 19 storey building at No. 69, Jalan Haji Hussein, Kuala Lumpur (the said premises). The Plaintiff had started its business at this premises sometime in 1975. The
B Plaintiff being a cooperative society, enjoyed getting customers mainly from its members consisting of about 6000 individual members and 50 cooperative societies eg, Police Cooperative Society, the Armed forces Cooperative Society and Wilayah Persekutuan Government Servants Cooperative Society. The products sold at the supermarket were mainly food stuff and
C essential household goods. The main entrance to the supermarket was at Lorong Haji Hussein 3 where 35 car parking bays were located. This side road is a thoroughfare and proved to be very convenient to the customers of the Plaintiff's supermarket for purposes of loading and unloading passengers and goods to their
D vehicles ...

Sometime towards the end of October 1996 the 2nd Defendant acting in concert with the 1st and the 3rd Defendants caused the Lorong Haji Hussein 3 (the said road) to be closed to all traffic. It began with the 1st defendant declaring and categorizing that part
E of Lorong Haji Hussein 3 adjacent to the Plaintiff's supermarket as a Temporary Occupational Licence (TOL) after an application by the 2nd Defendant who also closed the road to all traffic. Subsequently the 1st Defendant constructed 76 stalls at Lorong Haji Hussein 3.

F The purpose of the actions taken by the Defendants was as follows. The 1st Defendant, who at the relevant time known as Urban Development Authority (UDA), a statutory body, intended to construct two multi-storey building on Lot 2347, situated not far from the Plaintiff's supermarket on the same Jalan Haji
G Hussein. It so happened that during that time UDA's land was occupied by unlicensed hawkers. To commence development on the said land UDA had to remove the unlicensed hawkers first. To do that UDA sought the assistance of Dewan Bandaraya Kuala Lumpur (DBKL), the 2 Defendant in this suit, to have the said hawkers removed from UDA's land. However it was also
H necessary for the 2nd Defendant to locate a new place for the said hawkers. It was decided that the place would be Lorong Haji Hussein 3 that part of public road adjacent to the entrance to the Plaintiff's supermarket. To do that the approval of the Land Administrator for Wilayah Persekutuan Kuala Lumpur, the 3rd
I Defendant, to have the Lorong Haji Hussein 3 converted from a public road to a TOL had to be obtained. An application to that

effect was made by both the 1st and 2nd Defendants. The 3rd Defendant granted the application. Once that part of Lorong Haji Hussein 3 was converted into a TOL the 2nd Defendant closed the road to all traffic and the 1st Defendant constructed 76 stalls with a view to relocate the said hawkers here from UDA's land. Although keys to 36 stalls had been collected it would appear that only 12 stalls were occupied by the said hawkers. Be that as it may, its effect on the Plaintiffs supermarket business had been very adverse. The number of customers coming to the Plaintiffs supermarket began to dwindle. The main reason was due to access problem by cars and difficulty of parking. The road had been barricaded by the 2nd Defendant. The car parking bays had been abolished. That area had been congested with so many people, a completely different situation as that before it was closed.

The closure of the road was supposedly for a period of 2 years. But it turned out that it was only reopen to public after a period of 5 years. It was closed from 28 October 1996 to 30 November 2001. Due to the road closure the Plaintiff's supermarket business suffered tremendously. It had to resort to the selling of the building and renting it back from the purchaser in the hope that it would be able to sustain the losses within the period of 2 years during the road closure. But the Plaintiff was unable to sustain the loss any further as the road closure had continued well beyond the 2 year period. It therefore had to close its business.

[3] Despite experiencing substantial losses in the business caused by the closure of the said road, the respondent continued to operate the said supermarket at the said premises until September 2001. Then on 1 December 2003, the respondent was forced to sell the said premises for a sum of RM6 million but with a right to rent it back for a period of five years at a monthly rental of RM60,676. An option to renew this tenancy for a further term of five years at a rental based on prevailing market value was also accorded to the respondent by the new owner. About 2 1/2 years after they shut down the said supermarket, the respondent re-opened it in February 2004.

[4] Since it is necessary to bear in mind certain particular dates in this episode, I have highlighted them in chronological order:

20th October 1996	:	closure of Lorong Haji Hussein 3
September 2001	:	the respondent closed the said supermarket
November 2001	:	Lorong Haji Hussein 3 was re-opened

A 1st December 2003 : the respondent sold the said premises

February 2004 : the respondent re-opened the said supermarket at the said premises

Causes Of Action

B

[5] There are two causes of action relied on by the respondent to mount this claim. The first is against UDA Holdings, DBKL and the Government of Malaysia for public nuisance. The second is against DBKL and the Government of Malaysia for breach of C statutory duty.

[6] Based on the same reasons enunciated by Low Hop Bing JCA in his grounds of judgment (which I had the advantage of reading in draft) I agree that UDA Holdings, DBKL and the Government of Malaysia are liable under the cause of action for D public nuisance. But as correctly pointed by Low Hop Bing JCA, public policy demands that DBKL to be exempted from liability for pure economic loss. This is expounded in the Federal Court decision of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1. Though this case is based on the E cause of action for negligence, it is my view that by analogy it should also extend to a cause of action for public nuisance. However, since UDA Holdings is not a public body, the protection offered to DBKL does not apply to UDA Holdings. UDA Holdings is therefore liable to the respondent for public F nuisance.

[7] In respect of breach of statutory duty, I am of the view that aside from DBKL, the Government of Malaysia is also liable to the respondent. This was caused by the act of the Land G Administrator, Kuala Lumpur, a servant and/or agent of the latter, in issuing the TOL to a public road (Lorong Haji Hussein 3) and for the purpose of erecting the stalls thereon. This is contrary to the National Land Code and Road Transport Act 1987. In addition, breach of statutory duty was also committed by a H servant and/or agent of the Government of Malaysia in the person of the Secretary General of the Ministry of Local Government & Housing who approved the construction of the stalls and issued a certificate of inspection for them after they were constructed. On this cause of action for breach of statutory duty, I do not believe I that public policy exempts either DBKL or the Government of

Malaysia from a claim based on pure economic loss. These two bodies are therefore liable to the respondent for breach of statutory duty.

Respondent's Pecuniary Claims

[8] As the result of the actions of UDA Holdings, DBKL and the Government of Malaysia, the respondent claimed that they suffered the following losses:

1. Estimated loss of business between November 1996 till September 2003: RM9,844,157.
2. Difference between the market value of the said premises and the sale price: RM1,078,000.
3. Rental of the said premises (after sale) for the initial period of 5 years: RM3,640,560.
4. Rental of the said premises (after sale) for the optional period of another five years: RM2,370,000.
5. Loss of goodwill: RM1,811,000.
6. Loss of business in any event: RM5,000,000.
7. Interest at 8% per annum on judgment sum from date of filing to date of realization.
8. Costs.

[9] The learned trial judge allowed all these claims after holding that they were proven followed by a remark that the "Defence did not call any witness, let alone expert witness, to rebut the quantum of damages suffered by the plaintiff."

[10] This remark is obviously a mistake in the face of the appeal record where it disclosed that the defence called no less than 2 experts, one of whom is the Chair Professor of Business Administration with the University of Malaya (DW2), and the other a chartered accountant (DW8) with extensive experience in accounting practices to challenge the formulation and calculation of the amount claimed by the respondent.

[11] As each of the respondent's claims requires different treatment, I shall deal with them in turn. However before I do so, it is necessary to remind myself of the principle regarding the award damages suffered as a result of an interference with an ongoing business concern. It is "to award damages so as to put the claimant, as far as money can do, in the position he would have been in had the tort or breach of contract never occurred" – see para 4-001 McGregor on *Damages* 17th edn.

RM9,844,157: Loss Of Business

[12] The amount of RM9,844,157 estimated by the respondent for loss of business is derived in this manner. The respondent took the average past profit of the said supermarket for six years prior to the closure of the said road. This was from 1991 to 1996. The amount comes up to RM382,228.90 calculated in the manner shown below:

1991 profit RM694,513

1992 profit RM349.558.81

1993 profit RM334,706.16

1994 profit RM583,928.65

1995 profit (RM46,707.21)

1996 profit RM377,374

Total RM2,293.373.41 divided by six years = RM382,228.90

[13] The respondent then added this average past profit to the losses they suffered from September 1997 (year ending after the said road was closed) to September 2003 (just before they re-opened the said supermarket). The details of which are:

1. September 1997 annual loss RM693,281 + average past profit of RM382,228.90 = RM1,075,504.
2. September 1998 annual loss RM686,614 + average past profit of RM382,228.90 = RM1,068,842.
3. September 1999 annual loss RM351,577 + average past profit of RM382,228.90 = RM733.805.

4. September 2000 annual loss RM2,165,858 + average past profit RM382,228.90 = RM2,548,086.

5. September 2001 annual loss RM1,658,492 + average past profit RM382,228.90 = RM2,040,720.

6. September 2002 annual loss RM994,448 + average past profit RM382,228.90 = RM1,376,676

7. September 2003 annual loss RM618,296 + average past profit RM382,228.90 = RM1,000,524.

Total loss RM9,844,157.

[14] However, according to DW2 and DW8, this method of calculation is flawed in many ways. I shall deal with each of them in turn.

1. DW8 felt that average past profit for the six years is taken before tax. According to him the profit for each of the years under consideration should be pre-taxed since taxation charged ought to be included as a business expense in the income statement. This is in accordance with 'Financial Reporting Standard 112, Income Tax'. Therefore the average past profit should be reduced by deducting taxes levied on the profits of each of the six years taken for calculation of the average past profit.

   PW4, the actuary who was the principal proponent of this respondent's claim agreed to this when he said "I agree that I should use profit after tax and not profit before tax" (p. 526 vol. 2 appeal record). With this admission from the respondent, adjustment must be made to the average past profit which is used as a standard for calculation of the respondent's future business loss. I shall undertake to do so later when all necessary deductions are considered.

2. The next discrepancy raised by DW8 is that there are two items not related to the closure of the said road but included in the respondent's loss account for 2000 and 2001. They are:

   (a) A write off of RM992,245 for fixed assets of the respondent's Kulim and Kangar supermarket branches found in the respondent's account for year 2000. This has nothing to do with the closure of the said road.

(b) A loss caused by the sale of Amanah Saham in Perwira Affin Bank amounting to RM609,504. This was included in the respondent's 2001 account. Again this has no relationship with the closure of the said road.

On item (b) above, PW4 has admitted (at p. 526 vol 2 of appeal record) "that the road closure had nothing to do with the price of the unit trust".

With these disclosures and the admission, I agree that the amount highlighted above should be deducted in calculating future business loss of the respondent since they are not associated with the closure of the said road.

3. Both DW2 and DW8 next claimed that the respondent's business losses were not caused solely by the closure of the said road. They insisted that there were other equally important contributing factors. They could be summarized as: (a) The Asean economic recession in 1997 that severely affected the general spending power of Malaysian consumers at the material time; (b) Competition from hypermarkets in and around Kuala Lumpur; (c) The decline of the respondent's membership; (d) The uncertainty of the country's economy. I shall deal with each of these in turn.

3 (a) On the first contributing factor, the learned trial judge had found that the respondent's supermarket business was immune to such an economic recession as the commodities sold in the said supermarket were essential consumer goods. Proof of this was the profits gained by the said supermarket during the 1984 economic downturn.

I am inclined to agree with this observation and find that this contributing factor had little significant effect on the business of the said supermarket at that time under consideration.

3 (b) However on the second contributing factor, even the respondent themselves had admitted both orally and in their annual reports that the emergence and invasion hypermarkets had contributed to their losses. With these admissions, I feel that appropriate deduction ought to be made on the amount claimed by the respondent.

3 (c) The third contributing factor concerns the decrease in the patronage of the respondent's own members at the said supermarket. The respondent's statistics found in p. 463 of vol. 1 of appeal record has confirmed this decline. According to DW2, this could be due to the changing life style, values and taste of the respondent's members as well as to the new business format adopted by the respondent's competitors. But I am of the view that though this may be correct to a certain extent but nevertheless patronage of the said supermarket was not solely reliant on the respondent's own members. After all, the said supermarket was situated in a commercial area where the general public had access and this would have countered the shortfall caused by the respondent's members. Further, I am of the view that such decline in members' patronage could have been arrested or remedied if the respondent were accorded an opportunity to do so if not for the closure of the said road. Taking all these into consideration, I find this contributing factor insignificant to the calculation of the respondent's future business loss.

3 (d) Both DW4 and DW8 had pointed out that the respondent's estimate did not give due consideration to the uncertainty in the country's economy. They felt that since the country's economy fluctuates, future losses should take this into account.

This may be a factor but then the respondent's trade as explained earlier was immune to adverse economic conditions affecting the country. This factor, though significant in most other business, is less relevant in this case.

3 (e) DW8 has charged the respondent's experts for adopting an over-simplistic and unrealistic approach in calculating future business loss. He then elaborated his own formula.

[15] I have studied the alternative method provided by DW8. It is not the only acceptable method for calculating future business loss. It is just an alternative. The respondent's approach is no less inferior. Where the respondent's methodology includes the consideration of all relevant and applicable factors and elements then I failed to see why it should not be less preferred to the method proffered by DW8. To me, it is a reasonable method of calculation and there is no reason why it should not be accepted.

[16] Now that I have considered all the issues raised, I shall proceed to calculate the estimated loss by taking into consideration the necessary deductions discussed above.

[17] Average past profit after tax should be calculated as follows:

1991 profit after tax is RM451,433.45 (RM694,513 – RM243,079.55 (@ 35% taxable rate in 1991)

1992 profit after tax is RM227,213.23 (RM349,558.81 – RM122,345.58 (@ 35% taxable rate in 1992)

1993 profit after tax is RM217,559.01 (RM334,706.16 – RM117,147.15 (@ 34% taxable rate in 1993)

1994 profit after tax is RM397,071.49 (RM583,928.65 – RM186,857.16 (@ 32% taxable rate in 1994)

1995 profit after tax is nil since there is a net loss of (RM46,707.21).

1996 profit after tax is RM264,162 (RM377,374 – RM113,212 (@ 30% taxable rate in 1996)

Therefore the average past profit after tax should be: RM1,244,217.60 divide by six years = RM207,369.60

[18] This average past profit after tax is then added to the losses:

where in September 1997 the annual loss was RM693,281 (+ average profit RM207,369.60) = RM900,650.60;

where in September 1998 the annual loss was RM686,614 (+ RM207,369.60) RM893,983.60;

where in September 1999 the annual loss was RM351,577 (+ RM207,369.60) = RM558,946.60;

where in September 2000 the annual loss was RM2,165,858 but since a sum of RM992,245 was a write off of fixed assets of the Kulim and Kangar branches unconnected with the road closure, it has to be deducted. The actual loss was therefore RM1,173,613 (RM2,165,858 – RM992,245) (+ RM207,369.60) = RM1,380,982.60;

where in September 2001 the annual loss was RM1,048,988 (deducting from the original stated loss of RM1,658,492 a sum of RM609,504 which is unconnected loss suffered from the sale of Amanah Saham in Perwira Affin Bank) + RM207,369.60 = RM1,256,357.60;

where in September 2002 the annual loss was RM994,448 (+ RM207,369.60) = RM1,201,817.60;

where in September 2003 the annual loss was RM618,296 (+ RM207,369.60) RM825,665,60.

[19] Total losses from September 1997 to September 2003 is RM7,018,404.20

[20] As the emergence of hypermarkets had contributed to the losses, I am of the view that 25% ought to be deducted from RM7,018,404.20. This gives a balance of RM5,263,804. This, I consider to be a fair amount of compensation to the respondent for the loss of business due to the closure of the said road.

RM1,078,000: Difference Between Market Price And Sale Price Of The Said Premises

[21] The respondent has claimed that since they sold the said premises measuring 20,225 sq ft. below market value, they should be compensated a sum of RM1,078,000 which is the difference between the forced sale price of RM6 million and the estimated market value of RM7,078,000. I agree with the learned trial Judge's finding that if not for the prolonged closure of the said road causing severe loss to the said supermarket there was no necessity for the respondent to dispose off this property. As the sale of the said premises was a direct consequence of the closure of the said road, then this item of loss suffered by the respondent must be paid by the parties who caused it. I find this sum of RM1,078,000 a fair estimate for this category of loss suffered by the respondent.

RM3,640,560: Rental Of The Said Premises (After Its Sale) For The Initial Period Of Five Years

[22] DW2 and DW8 had challenged the respondent's claim of RM3,640,560 for rental to the said premises for the initial period of five years after the said premises was sold.

[23] They first said that rental for the said premises was part of the operating cost. Second, it was a management decision to re-open the said supermarket in the said premises. As such the respondent should be responsible for taking such risk. Third, there should be "future discounted returns on assets (either through use or rental)" since the consideration obtained from the sale of the said premises was realised up-front. Finally, the connection between this claim and the closure of the said road is too remote.

[24] I am much attracted to the first ground advanced in this challenge. I observed that in the all profit and loss accounts tendered by the respondent there was an item allocated to rental. This provision must be for the return on the respondent's own fixed asset ie, the said premises which belonged to them. As this property was their own, such amount could be listed as rental in the respondent's operating cost for the running of the said supermarket. When rental has been accounted as an item in the operating cost and the amount claimed for the loss of business amount was allowed based on such account then claiming payment of rental separately once again would, in my view, be making a claim for the same item twice. This is because rental for the said premises has been duly considered when compensating the respondent for the loss of the business.

[25] If I have erred in accepting that rental was provided for as operating expense for the running of the said supermarket, and that no provision was ever made by the respondent in the operating cost for rental income derived from their said premises, then the average profit which was used as a standard to add to each year of loss from September 1997 to September 2003 as well as the losses suffered by the respondent subsequent to the closure of the said road would be completely wrong. This is based on the basic proposition that if the said premises had been rented out, it would have fetched the respondent an income and this should be credited into the respondent's account.

[26] As I believed that rental for the return of the said premises had been provided as part of the operating cost of the said supermarket, the respondent should not be entitled to this claim for rental once again.

[27] On the second challenge that it was a management decision to re-open the said supermarket at the same premises, I am of the view that this was a commercial policy decision. However, this decision was taken as a direct result of the events that transpired ie, the closure and the re-opening of the said road. As such the respondent should not be faulted for adopting such a decision which was, to me, a natural outcome.

[28] On the contention by DW 8 that there should be a discount for the money obtained up-front resulting from the sale of the said premises, I am in agreement. However, as the claim under this category of loss should be dismissed for the reason as stated, I need not elaborate on this and on the claim that the connection between this and the closure of the said road is too remote.

RM2,370,000: Rental Payable On Option To Renew The Tenancy To The Said Premises

[29] The respondent has added to their claim a sum of RM2,370,000 for rental to be paid on the said premises for the extended period after the initial term of five years. This is based on the assumption that the respondent would continue with their business at the said premises by exercising their option to renew the tenancy. The amount of RM2,370,000 is arrived at in this manner:

> RM39,500 per month x 60 (based on the option right to renew for another five years) = RM2,370,000.

[30] First, I am at a loss as to how the base figure of RM39,500 per month is obtained. The tenancy agreement between the respondent and the new proprietor of the said premises specifies that rental for the optional period would be at "prevailing market value". This, of course requires determination at a future date. So pegging the figure of RM39,500 per month rental for this extended period is unrealistic and not scientifically estimated. It lacks certainty. Further, it would also fail for the same reason as I have given for the claim for current rental, In addition, if I may add, it is too remote and over-extended. If the said supermarket business does not improve and losses continue then there is no option for the respondent to continue operating in the said premises. They would have to move somewhere else or to close

down this enterprise altogether. I do understand that the respondent is a body corporate and will exist in perpetuity but the issue here is not whether they will cease to continue with the objectives laid down in their constitution, it is whether they must persist in the same location where they experience perpetual loss.

RM1,811,000: Loss Of Goodwill

[31] The respondent has claimed a sum of RM1,811,000, calculated by PW4, for loss of goodwill for the said supermarket. PW4 defined goodwill as "that a willing vendor will be prepared to accept at a price that a willing buyer will be prepared to pay in an arm's length transaction for the goodwill of the business that was carried out at that location". This does not include tangible assets such as real property, stock-in-trade, furniture and fittings and equipment. The basis for this claim, according to PW2 (the respondent's accountant), is because there was a "loss in the sale value of the business caused by disruption (due to the closure of the said road) and this is calculated actuarially".

DW8, on the other hand, termed goodwill as:

> Firstly, goodwill, as generally understood, represents the difference between the value of the business as a whole over the sum of its parts (ie the net assets of the business), In accounting standards, goodwill represents future economic benefits arising from assets that are not capable of being individually identified and separately recognized (see Financial Reporting Standard 3, Business Combinations). Goodwill of a business arises when there are unidentifiable but favourable attributes, such as customer loyalty, motivated workforce, good location, business connection, synergies, etc. These attributes enable a business to generate a return in excess of a normal return on the net assets employed, ie, there must be evidence of superior or above normal profit to support the existence of goodwill.

[32] I do not think that there is any material difference between these two interpretations except that the former is less technical than the latter. Both mean the same thing. However, what is pertinent here is whether there is goodwill in the first place and whether the respondent is entitled to it and if so, how much?

[33] It cannot be denied that prior to the closure of the said road, except for the year 1995, the said supermarket had consistently returned a profit to the respondent. This would attract goodwill for anyone interested to purchase the said supermarket at that time because of its profitable track record. But after the said road was closed, profits plummeted significantly into loss. By then potential buyers would not have parted a cent for the goodwill attached to the business. In this sense, I find that the respondent had indeed suffered a loss of goodwill and ought to be compensated. But at what price?

[34] On the estimate for loss of goodwill, DW8 questioned the methods and factors employed by PW4 in arriving at RM1,811,000. He felt that goodwill enjoyed by the respondent, if at all, should be zero. Having given due consideration to the views of both these experts, I conclude that the methodology employed by PW4 in coming up with his estimate is reasonable and well supported by acceptable principles. I see no reason why it should be rejected. Thus, the respondent should be entitled to this item of claim.

RM5,000,000: Loss Of Business In Any Event

[35] The respondent's last item of claim is a sum of RM5,000,000 for loss of business in any event. They explained that this differs from the claim for loss of business as the respondent would need funds to promote the said supermarket business to what it was before the closure of the road. PW2 even went further to stress that this "is a very moderate estimate" that includes the cost of promotions, advertisements and the like. Surprisingly, though the respondent had re-opened the said supermarket in February 2004, no evidence was advanced by the respondent to show the exact amount that was spent on promotions. I would have thought that that would be the most opportune time to attempt to reinstate the said supermarket business back to its former glory. Aside from the absence of such cogent evidence, there is also no disclosure as to how this amount of RM5,000,000 is arrived at. Unlike the claim for the loss of goodwill, which was well supported by expert's calculations based on established formula, this substantial sum of RM5,000,000 seems to be plucked out of the air. Without cogent evidence to convince the court as to how this amount is arrived at, such claim ought to be dismissed.

A **Conclusion**

[36] In conclusion, based on my reasons aforesaid, I am of the view that only the following be allowed:

B	1. Loss of business:	RM5,263,804
	2. Loss suffered as a result of the sale of the said premises:	RM 1,078,000
C	3. Loss of goodwill:	RM1,811,000
	Total:	RM8,152,804

[37] There should also be interest of 8% per annum thereon from date of filing to date of realization.

D

[38] This amount should be paid by UDA Holdings, DBKL and Government of Malaysia equally.

[39] Accordingly, these appeals should be allowed in part to the E amount as stated. There shall be half costs for these appeals to be paid by UDA Holdings, DBKL and Government of Malaysia respectively to the respondent. The deposits for these appeals to the respondent towards account of taxed costs. The order of the High Court varied in respect of damages to the sum of F RM8,152,804 with interest thereon at 8% per annum from date of filing to date of realization and costs.

Low Hop Bing JCA:

Appeals

G

[40] There are three related appeals *viz*:

Civil Appeal	Appellant
H (1) W-02-735-2006	UDA Holdings Sdn. Bhd. the first defendant in the High Court ("UDA")
(2) W-02-653-2006	Dato Bandar Kuala Lumpur, the second defendant in the High I Court ("DBKL").
(3) W-01-79-2006	Government of Malaysia, the third defendant in the High Court.

[41] The respondent is Koperasi Pasaraya Malaysia Bhd, the plaintiff in the High Court ("the Supermarket").

[42] The appellants have appealed against the decision of the learned Kuala Lumpur High Court judge who had on 21 September 2006 allowed the Supermarket's claim and awarded damages amounting to RM23,743,157 with interest at 8% p.a. and costs.

Supermarket's Cause Of Action

[43] In essence, the Supermarket's cause of action as pleaded in the repeatedly amended statement of claim against UDA, DBKL and the Government of Malaysia is founded on public nuisance and breaches of statutory duties.

Factual Background

[44] First, the agreed facts.

[45] Commencing 1975, the Supermarket has been operating for 21 years on its own premises at 69, Jalan Haji Hussein, which is near the Chow Kit wet market in central Kuala Lumpur. It had a direct entrance along Lorong Haji Hussein Tiga which is an open road ("the Road") with 35 on-the-road parking bays on one side.

[46] Pursuant to the application by UDA and DBKL, the Kuala Lumpur Land Administrator ("the land administrator") an officer of the Government of Malaysia issued a Temporary Occupation Licence ("the TOL") to UDA in respect of the land in the middle of the Road ("the affected portion of the Road").

[47] On 29 October 1996, the direct entrance to the Road from Jalan Haji Hussein was barricaded. After six months, a building comprising 76 stalls was constructed by UDA on the affected portion of the Road to relocate unlicensed hawkers from Lot 2347 which is the land owned by UDA ("UDA's land") in the Chow Kit market area. Once UDA had completed the construction of a multi-storey building on UDA's land, the 76 stalls would be demolished. They were indeed subsequently demolished and the Road was opened five years after it was first barricaded.

[48] In September 1996, the Supermarket recorded more than RM21 million in sales per annum for the third successive year. Immediately after the affected portion of the Road was closed to all vehicles, the Supermarket experienced a sharp drop in its

turnover. This drop in sales deteriorated drastically. The Supermarket then sold its premises in order to realise cash to pay creditors. Meanwhile it negotiated for a lease with the purchaser for it to carry on its business on the same premises as a lessee. The Supermarket finally closed down in 2003.

[49] Apart from the above agreed facts, after a protracted trial covering some 23 days, the learned trial judge also arrived at certain finding of facts which, where relevant to these appeals, may be unfolded later in this judgment, in addition to the following narrative.

[50] The Supermarket enjoyed getting customers mainly from 6000 individual members and 50 co-operative societies. The products sold at the Supermarket were essentially foodstuff and household goods. It operated daily and has some 3500 customers from 8am to 10pm. It closed only for two days on Hari Raya Puasa and two other days in a year for stock-taking.

[51] Based on the nature of goods sold and the type of customers, the Supermarket's business was not affected by recession or competition by the emergence of wholesale markets and hypermarkets prior to 1996.

[52] Towards the end of October 1996, DBKL acting in concert with UDA and the Government of Malaysia by way of the TOL caused the affected portion of the Road to be closed to all traffic.

Preliminary Orders

[53] Prior to the trial of this action, the learned judge made two preliminary orders *viz*.

(1) that the TOL was validly issued; and

(2) the Supermarket's action was struck out for failure to comply with the requirements of proving special damage based on public nuisance under s. 8 of the Government Proceedings Act 1956.

[54] The Court of Appeal subsequently allowed the Supermarket's appeal, set aside both the preliminary orders and directed the learned judge to proceed with the full hearing of the action, which was dutifully complied with. The learned judge stressed that he had made the two preliminary orders based purely on procedure as the full facts of the case were not before him.

[55] Before proceeding to the trial, the Supermarket had in its final amended statement of claim sought damages only, as the 76 stalls had since been demolished.

Validity Of The Tol

[56] In the instant appeals, learned counsel En. Zainur Zakaria submitted for UDA that the learned trial judge had erred in concluding that the TOL had been invalidly issued, as the land administrator has the power to issue the TOL under ss. 65 and 66 read with s. 42(2) of the National Land Code 1965 ("NLC").

[57] Learned counsel Mr. Ramesh Abraham, assisted by Mr. Sudharsaran Thillainathan, argued for DBKL that the Supermarket had not sought any order to declare the TOL invalid but had limited its claim to damages only.

[58] Learned Senior Federal Counsel, Ms. Narkunavathy Sundareson, submitted for the Government of Malaysia that the issuance of the TOL by the land administrator to UDA had complied with proper procedure.

[59] It was contended by Mr. A. Kanesalingam, the Supermarket's learned counsel, that the validity of the TOL was *res judicata* in view of the decision of the Court of Appeal which had set aside the two preliminary orders of the learned trial judge.

[60] It is pertinent for me to note that the learned trial judge had after a full hearing of the action specifically found that the validity of the TOL was a non-issue. That being the case, his Lordship's view that the TOL had been invalidly issued was at best mere *obiter dictum* and not *ratio decidendi*. Hence, I do not feel the necessity to delve upon this non-issue any further.

Public Nuisance

[61] UDA complained that the learned trial judge had erred in concluding that public nuisance had been proved when the barricade of the Road had only made it less convenient to the shoppers.

[62] DBKL asserted that the Supermarket has not established public nuisance as this tort requires proof that the alleged nuisance had not only affected the Supermarket but also the public or a class of members of the public, relying on *Halsbury's*

Laws of Malaysia, vol. 5, pp 265 to 266 para 80 262; *Takong Tabari v. Government Of Sarawak & Ors* [1995] 1 CLJ 403 HC; and *Attorney-General (On the relation of Glamorgan County Council and Portardawe Rural District Council) v. P.Y.A. Quarries Ltd* [1957] 1 All ER 894 CA.

[63] The Government of Malaysia took the view that the TOL was only intended to facilitate the erection of 76 stalls, pending the construction of UDA's two multi-storey buildings on UDA's land, and that the learned trial judge had erred in holding that the Government of Malaysia had caused public nuisance to the Supermarket.

[64] The Supermarket responded that the learned trial judge had correctly considered and rejected the three appellants' reliance on the TOL as a defence.

[65] I would start with the burden of proof. As the Supermarket is the party asking the court to give judgment as to the legal right or liability, dependent on the existence of facts which the Supermarket asserts ie, public nuisance, it bears the burden of proving the tort of public nuisance. In this regard, the Supermarket must establish facts which constitute public nuisance: see s. 101 of the Evidence Act 1950; *EON Bank Bhd v. Flamingo And Another Case* [2005] 5 CLJ 253 HC; *Tenaga Nasional BHD v. Perwaja Steel Sdn Bhd* [1995] 4 CLJ 670 HC; *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86 FC; and *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147 HC.

[66] The term "nuisance" covers a wide variety of tortious acts or omissions and may not be capable of any legal definition. Its definition will depend on the surrounding circumstances. An illustration of nuisance arises where a person's right of free passage or part thereof has been the subject of interference. He is endowed with the right to take up a nuisance action: per Suriyadi J (now JCA) in *Parimala a/p Muthusamy v. Projek Lebuhraya Utara-Selatan* [1997] 4 CLJ 54.

[67] By way of extension and elaboration, public nuisance is one which inflicts damage, injury or inconvenience on subjects of the State or on members of a class who come within the sphere or neighbourhood of its operation, although it may affect some members to a greater extent than others. The determination of whether the number of persons affected is sufficiently large so as

to constitute a class for this purpose is one of fact: See *Halsbury's Laws of Malaysia,* vol. 5 pp 265-266 para 80. 262; *Takong Tabari, supra,* per Richard Malanjum J (now CJ (Sabah & Sarawak)); and *P.Y.A. Quarries Ltd, supra,* at p. 902 D-F per Romer LJ.

[68] The public nuisance which the Supermarket has to prove is that which affects the public or a class thereof generally and the Supermarket specially. In this connection, an analysis of the facts is of immense importance.

[69] The Road had provided the Supermarket with a direct entrance and 35 parking bays. It was a thoroughfare and proved to be very convenient to the Supermarket's customers in terms of loading and unloading passengers and goods to their vehicles.

[70] Towards the end of 1996, DBKL acting in concert with UDA and the Government of Malaysia caused the affected portion of the Road to be closed to the public and indeed to all traffic, while UDA constructed the 76 stalls there.

[71] The cumulative and ultimate effect of the steps taken by UDA, DBKL and the Government of Malaysia was to enable UDA to develop and construct two multi-storey buildings on UDA's land situated not far from the Supermarket.

[72] During that time, UDA's land was occupied by unlicensed hawkers. UDA had to remove these hawkers in order to commence development thereon. UDA had sought DBKL's assistance to have the hawkers removed from UDA's land. To this end, DBKL decided to relocate the hawkers to the affected portion of the Road adjacent to the direct entrance of the Supermarket. To do that, UDA and DBKL had applied for and obtained the TOL from the land administrator for the affected portion of the Road. Thereafter, DBKL closed the Road to all traffic, and UDA constructed the 76 stalls for the purpose of relocating the hawkers. Consequently, the Supermarket's business was adversely affected. The number of customers coming to the Supermarket began to dwindle, as the Road had been barricaded, and parking bays wiped out. That area was so congested that it was completely different from the original thoroughfare prior to its closure.

[73] What was initiated by the three defendants as a two-year closure was stretched to more than five years, from 28 October 1996 to 30 November 2001. The adverse effect on the Supermarket's business led to the sale of the premises by the Supermarket to and renting it back from the owner subsequently. The Supermarket had hoped that it could sustain the two-year closure, but that was not to be the case. The Supermarket was unable to bear the loss any further in view of the five-year closure. That spelt the eventual collapse and demise of the Supermarket's business.

[74] The concerted acts of the three defendants culminating in the closure of the affected portion of the Road in a busy commercial area for more than five years had clearly inflicted damage, injury or inconvenience on the subjects of the State viz the users of the Road as well as members of a class *viz* the customers of the Supermarket generally and the Supermarket specially. Such acts certainly constitute public nuisance.

[75] Generally, under s. 8(1) of the Government Proceedings Act 1956, public nuisance is actionable at the instance of:

(1) the Attorney-General; or

(2) a relator action, by two or more persons having obtained the consent in writing of the Attorney-General, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case, though no damage has been caused.

[76] However, s. 8(2) of the same Act states that nothing in s. 8 shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

[77] In my judgment, on the above analysis of facts, the public nuisance collectively caused by the three defendants herein is actionable at the instance of the Supermarket whose right of suit is independent of s. 8(1). The concerted acts of the three defendants had inflicted on the Supermarket special damage not merely in degree but also different in kind in the exercise or enjoyment of its rights and convenience. Such special damage is over and above that suffered by members of the public generally as users of the Road and customers of the Supermarket. In the circumstances, the Supermarket has succeeded in proving public

nuisance on a balance of probabilities against all the three defendants. The learned trial judge has arrived at a correct finding on this issue.

Breach Of Statutory Duty

[78] In order to attach liability to a defendant such as DBKL for breach of statutory duty, the Supermarket as plaintiff has to establish that:

(a) the injury the plaintiff has suffered is within the ambit of the statute;

(b) the statutory duty imposes on the defendant a liability to civil action;

(c) the statutory duty was not fulfilled by the defendant; and

(d) the breach of duty has caused injury to the plaintiff. (See the judgment of Lim Beng Choon J (as he then was) in *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC).

[79] His Lordship also explained that:

(i) A statute may impose a duty towards persons generally, in which case no question can arise of whether the plaintiff is within the class protected;

(ii) Where a statute confers powers coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie: *Schacht v. The Queen in Right of the Province of Ontario* [1972] 30 DLR (3d) 641;

(iii) Where the loss is occasioned by failure to exercise a power coupled with a discretion, there is no liability: *Great Central Railway Co v. Hewlett* [1916] 2 AC 511;

(iv) A plaintiff is entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power: *David v. Abdul Cader* [1963] WLR 834; and

(v) If a statute creates a duty but imposes no remedy, civil or criminal, for its breach, there is a presumption that a person injured thereby will have the right of action, for otherwise "the statute would be but pious aspiration" (see the judgment of Lord Simons at p. 407 in *Cutler v. Wandsworth Stadium Ltd* [1949] AC 398).

[80] DBKL sought to disclaim liability on the ground that the Supermarket had failed to prove any breach of statutory duty by DBKL.

[81] It was submitted for the Supermarket that DBKL had *inter alia*:

(1) failed to maintain the Road as a public street, in contravention of s. 12 of the Street, Drainage and Building Act 1974 ("s. 12"); and

(2) failed to remove the obstruction, and instead allowed the Road to be barricaded, contrary to s. 46 of the same Act ("s. 46").

[82] Having regard to the above facts, I shall now examine the specific elements in order to ascertain whether the Supermarket has established this tort against DBKL.

[83] Section 12(1) provides for the declaration of a public street of which the Road is one. Being a public street, the Road shall "forever afterwards be maintained by the local authority" such as DBKL in this case.

[84] Where relevant, s. 46(1)(a) creates the offence of obstruction in the following words:

> 46. Obstruction
>
> (1) Any person who:
>
> (a) builds, erects, sets up … or permits to be built … other obstruction, in any public place, shall be guilty of causing an obstruction …

[85] Under s. 46(3)(a), a local authority such as DBKL "may cause any such obstruction to be removed or may itself through its servants remove the same to a suitable place."

[86] In my view, DBKL's failure to maintain the Road as a public street is clearly demonstrated by DBKL's barricade to the Road and allowing UDA to erect the 76 stalls thereon. The result of the barricade is the obstruction caused by DBKL to the Road.

[87] The powers conferred on DBKL by s. 46(3)(a) to remove the obstruction or cause it to be removed are in my view coupled with a duty to effect the removal thereof. DBKL's omission to do so constitutes a breach of statutory duty. Failure to maintain the Road as a public street under s. 12 is another illustration of such breach by DBKL, against which a remedy will lie: *Schacht, supra.* The injury the Supermarket has suffered, ie, the eventual collapse of its business, is consequent upon DBKL's breaches of the statutory duties expressed in ss. 12 and 46.

[88] Although ss. 12 and 46 do not expressly impose a civil remedy for such breaches, there is a presumption that the Supermarket as the party injured thereby will have the right of action: see *Cutler, supra*, per Lord Simons.

[89] DBKL's omission to perform its duty to maintain the Road as a public street under s. 12(1) and its failure to exercise the powers under s. 46(3)(a) to remove the obstruction are obvious manifestations of DBKL's non-fulfilment of its statutory duties.

[90] There can be no doubt that DBKL's breaches of statutory duties under s. 12 and s. 46 have caused injury to the plaintiff as reflected in the eventual collapse of the business of the Supermarket.

[91] In the circumstances, I hold that the Supermarket has successfully established breaches of statutory duties occasioned by DBKL.

Defence

[92] In essence, the common defence of the three defendants gravitates towards the exercise of statutory powers pertaining to the issuance of the TOL by the land administrator as an officer of the Government of Malaysia.

[93] The learned trial judge had acknowledged that the land administrator has the authority to issue the TOL under ss. 65 and 66 read with s. 42(2) of the NLC, but has rejected it as a defence.

[94] It is clear to me that the TOL was issued in respect of a public road heavily used by members of the public and the occupiers of the buildings along the Road. The TOL could not

override or interfere with their daily right or enjoyment in the use of the Road. It cannot simply disregard the hardship caused to users of the Road generally and the Supermarket specially.

[95] In the exercise of the land administrator's powers in the issuance of the TOL to enable DBKL to barricade the Road and to facilitate the erection of the 76 stalls by UDA, DBKL and the land administrator as an officer of the Government of Malaysia had effectively disregarded the rights of the users of the Road generally and the Supermarket specially. The TOL does not and could not clothe the three defendants with a carte blanche, licence or defence to cause, create or bring about public nuisance or breaches of statutory duties.

[96] Support for my view may be garnered from two weighty authorities, *viz*

(1) *Syarikat Perniagaan United Aces Sdn Bhd & Ors v. Majlis Perbandaran Petaling Jaya* [1996] 4 CLJ 301 FC, where the municipal council (MPPJ) had relocated a group of night market hawkers to a new trading site along Jalan SS21/60 ("this road"). Consequently, this road was temporarily closed between 5pm and 7am. The hawkers' filth was unbearable and public health was at stake. Five of the tenants/occupiers of this road filed an application for *certiorari* to quash MPPJ's decision to close this road. The application was dismissed with costs by the High Court. The Federal Court through the judgment of Wan Yahya FCJ (as he then was) allowed the appeal and held *inter alia* that the temporary closure was clearly *ultra vires* s. 65 of the Local Government Act 1976, although that section provides that a local authority may temporarily close any public place vested in or under its control. The Federal Court made it clear that the exercise of a statutory power to close any public road under eg, s. 65 does not provide a defence if the result was the creation of obstruction, health hazard or a situation detrimental to the residents of the premises along this road.

(2) *Vasiliou v. Secretary of State for Transport and Another* [1991] 2 All ER 77, where the (UK) Town and Country Planning Act 1971 s. 209, as amended, empowers the Secretary of State to make an order to authorize the stopping up or diversion of any highway for development to be carried out. In considering

s. 209, the English Court of Appeal, speaking through Nicholls LJ, held that the exercise of the powers to stop up or divert any highway for development does not mean that the Secretary of State could disregard the adverse effect on the trade of an owner of a business being done on the land adjoining the highway and the financial loss resulting as a direct consequence of that loss of trade.

[97] I am aware that the above two weighty judgments were handed down in relation to judicial review in administrative law. However, the principles enunciated therein are nevertheless applicable to the domain of public nuisance and breaches of statutory duties under consideration in the appeal herein.

[98] I therefore hold that the learned trial judge was right in rejecting the defendants' defence based on issuance of the TOL.

Collapse Of Business

[99] All the three defendants submitted in substantially similar vein that the learned trial judge had erroneously concluded that the collapse of the Supermarket's business was entirely due to the closure of the affected portion of the Road and the erection of the 76 stalls on it, adding that there were other causes such as economic recession, stiff and unfair competition from hypermarkets, increased operating costs of the Supermarket's branches in Kulim and Kangar and the unsatisfactory customer service rendered by the Supermarket's members of the staff.

[100] The Supermarket supported the learned trial judge's conclusion that the collapse of the Supermarket's business was entirely and directly due to the closure of the affected portion of the Road and the erection of the 76 stalls thereon.

[101] In my judgment, the Supermarket's business depended wholly and exclusively on the customers who were used to parking their cars at the parking bays on the Road for the purpose of loading and unloading foodstuff and household goods purchased from the Supermarket. The closure of the affected portion of the Road and the erection of the 76 stalls had put a halt to the flow of traffic and customers to the Supermarket. The lifeline of the Supermarket's business appeared to have been disconnected, not for two years as originally contemplated by the defendants, but for the inordinate period of five years. The tremendous adverse effect on the Supermarket's business is plain and obvious.

[102] While it may be true that economic recession or financial crisis in the nineties had brought about the collapse of untold business ventures, it is significant to observe that the essential foodstuff and household goods sold in the Supermarket were not luxury items. They were sold at both economical and competitive prices by the Supermarket. They constituted the daily and recurrent needs of 3500 customers drawn from its members consisting of some 6000 individuals and 50 co-operative societies. The Supermarket has established that it was largely recession-proof during the economic crisis in 1985 when the Road was a thoroughfare.

[103] The emergence of several wholesale markets and hypermarkets were reflected in the Supermarket's annual reports which expressly stated that they were not considered as competitors. The sales and profits of the Supermarket remained substantially consistent, due to the convenience which the Supermarket's customers enjoyed prior to the closure of the affected portion of the Road.

[104] Apparently, alternative parking bays available at the hotel car park on the upper floor in the same building as the Supermarket did not appear to be attractive to the Supermarket's customers. The customers had not only to pay for the use of parking bays, but were also deprived of the convenience and ability to load and unload the purchased items at the direct entrance to the Supermarket.

[105] I am of the view that the learned trial judge had not erred in concluding that the three defendants' concerted acts have entirely and directly caused the collapse of the Supermarket's business.

Pure Economic Loss

[106] It was contended that DBKL's liability for the Supermarket's claim for pure economic loss based on the tort of public nuisance is excluded by the judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 FC ("MPAJ").

[107] In response, it was argued for the Supermarket that its claim against DBKL was grounded not merely on public nuisance, but also breaches of statutory duties.

[108] I note that the causes of action in *MPAJ, supra*, were founded on negligence and nuisance. The relevant question for determination by the Federal Court was whether it was fair, just and reasonable to impose a liability on a local authority such as MPAJ for pure economic loss to the plaintiff for MPAJ's failure to come up with and implement the promised drainage master plan etc to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3 of the Highland Towers in the Mukim of Hulu Klang within the local authority area of MPAJ. The answer was given in the majority judgment delivered by Abdul Hamid Mohamad FCJ (Arifin Zakaria FCJ concurring). In para 86, it was held that Malaysian courts will have to consider the effects of s. 3 of the Civil Law Act 1956. After considering "public policy" and "local circumstances", his Lordship held that it was not fair, just and reasonable to impose such a burden on MPAJ or other local authorities in this country in similar situations arising from negligence and nuisance (paras 82 and 84).

[109] It appears plain to me that the ratio expounded in the majority judgment of the Federal Court excluded MPAJ or other local authority from liability in any claim by a plaintiff for pure economic loss arising from negligence and nuisance. The Federal Court was not asked to determine and has therefore not decided on the issue of whether MPAJ or other local authority such as DBKL is insulated or immunized against liability for pure economic loss arising from breaches of statutory duties.

[110] In my view, DBKL may rely on the majority judgment of the Federal Court to exclude liability from the Supermarket's claim for pure economic loss based on negligence and nuisance only. With the utmost respect, the majority judgment does not provide DBKL with an insulation or immunization against its liability arising from breaches of statutory duties.

Damages

[111] The three defendants contended that in awarding the sum of RM23,743,157 ("the sum") to the Supermarket as damages, the learned trial judge had overlooked the apportionment of liability between the defendants, mitigation of damages, overlapping claims, capital expenditure and other factors that caused the collapse of the Supermarket's business.

[112] The Supermarket responded that the claim for damages was supported by figures from audited accounts in relation to the actual loss caused by the obstruction and damages to restore the goodwill and business of the Supermarket to the same position before the disruption.

[113] In awarding the sum, the learned trial judge accepted the evidence of several witnesses, including PW4, an actuary.

[114] I would first set out the general object of awarding damages contained in *Clerk & Lindsell on Torts* 16th edn, at p 254 para 5-04:

> The general object of an award of damages is to compensate the plaintiff for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant's tort. More specifically, the assessment process is said to aim at *restitutio in integrum*. The general principle is, in the oft-quoted words of Lord Blackburn, that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.' The principle admits of application to losses which are capable of reasonable precise calculation in money terms.

[115] The question is whether the sum awarded by the learned trial judge is consistent with the above general object and principle.

[116] The actuary's evidence reveals that the closure of the affected portion of the Road on 28 October 1996 had caused the total sales of the Supermarket to drastically fall by some RM3,000,000 ie from RM21,128,835.81 at the end of September 1996 to RM17,225,099.20 at the end of September 1997. The Supermarket's business suffered a loss of RM693,281 for the accounting year ending September 1997.

[117] The Supermarket's computer print-out dated 13 October 1997 shows that per day the number of Supermarket's customers who made purchases fell from 3,500 to 2,551.

[118] The Supermarket's general manager, PW1, testified on the comparative profits and losses as shown in the following chart:

Year	Sales RM	Profit/Loss RM
1996	21,128,835.81	377,374.05
1997	17,225,099.20	(693,281)
1998	14,273,874.71	(686,614)
1999	10,507,246.65	(351,577)
2000	6,909.886.12	(2,165,858)
2001	1,554,029.16	(1,658,492)
2002	55,651.87	(994,448)
2003	3,900	(618,296)

[119] By the time the Road was reopened in November 2001, the Supermarket had lost all its customers. For the years 2002 and 2003, the suppliers refused to give credit to the Supermarket and the Supermarket had no cash to pay for supplies.

[120] Prior to the closure of the affected portion of the Road, the Supermarket enjoyed the average profit of RM382,228.90 which is derived from the profits computed over the previous six years before September 1996 amounting to RM2,293,373.41 as shown in the chart below:

1991	RM 694,513.00
1992	RM 349,558.81
1993	RM 334,706.16
1994	RM 583,928.65
1995	RM (46,707.21)
1996	RM 377,374.00
Total	RM2,293.373.41

Total profits for six years from 1991 to 1996 is RM2,293.373.41

Divided by 6 years = RM382,228.90 (the average).

[121] Effectively, the Supermarket incurred a total loss of RM9,844,157 in seven years commencing 28 October 1996 as shown in the following computations:

Year Ending September	Annual Loss (RM)	Total Loss Per Year (RM)
(a) 1997: there was a Loss instead of profit	(693,281)	
The profit which should have been made using the average		
Profit ought to be added to The loss suffered RM382,228 + (RM693,281)		1,075,504
(b) 1998	(686,614)	
RM382,228 + (RM686,614)		1,068,842
(c) 1999	351,577	
RM382,228 + (RM351,577)		733,805
(d) 2000	2,165,858	
RM382,228 + (RM2,165,858)		2,548,086
(e) 2001	1,658,492	
RM382,228 + (RM1,658,492)		2,040,720
(f) 2002	994,448	
RM382,228 + (RM994,448)		1,376,676

(g) 2003	618,296	
RM382,228 + (RM618,296)		1,000,524
Total loss from November 1996 till September 2003		RM9,844,157

[122] The closure of the affected portion of the Road and the erection of the 76 stalls in the middle thereof had forced the Supermarket to sell its premises in a prime location below the market value. The Supermarket negotiated with the buyer of the property to lease the property to the Supermarket for a fixed period of five years, with an option to renew for a further period of five years. The Supermarket had to resort to these measures because it needed the proceeds of sale to maintain the Supermarket and to pay numerous creditors.

[123] In relation to the sale of the premises below market value, the valuer (PW6) testified from his experience that most buyers of property would want vacant possession and if the plaintiff sells the property and at the same time wants to occupy the property, there is the possibility of a negotiation to have lower selling price than the market price, depending on the circumstances of the case. He explained that between July 2002 and December 2003, properties of this nature would not have deteriorated in value.

[124] The Supermarket had been carrying on its business at the location for more than 20 years and had its customer base living or working in areas around that location which was important for a retail outlet. Hence, the Supermarket had to choose a buyer who would lease the property back to the Supermarket. So on 1 December 2003, the Supermarket was forced to sell the premises at a price lower than the market value. The Supermarket suffered a loss of RM1,078,000, being the difference between the market value of RM7,078,000 and the actual sale price of RM6,000,000.

[125] After selling the property, the Supermarket had to pay a monthly rent to carry on its business on the same premises, which expenditure the Supermarket did not incur before the closure of the affected portion of the Road.

[126] From 1 December 2003, the Supermarket had to pay RM60,676 per month for five years with an option to renew for five years at the market value prevailing on the renewal. The Supermarket had by a registered lease agreement contracted to pay the rent of RM60,676 for 60 months (five years) amounting to a total sum of RM3,640,560.

[127] Being a cooperative society, the Supermarket was a body corporate with perpetual succession. It had expected to carry on its business permanently. Prior to the closure of the affected portion of the Road, the Supermarket had never anticipated discontinuance of its business at any time. The Supermarket therefore obtained the option to renew the lease and committed itself to pay a further sum of RM39,500 during the option period for five more years (RM39,500 x 60 months) amounting to RM2,370,000.

[128] In addition, the Supermarket suffered a loss of goodwill or the capital value of its business which the actuary estimated at RM1,811,000, after considering the audited accounts of the Supermarket.

[129] The actuary testified that there was no overlapping between the claim for loss of profit and claim for loss in capital value as of 30 September 2004, and there was no claim for previous years as in the case of loss of profit. He added that there was no overlapping between the loss in the sale of the premises and the claim for rent.

[130] The actuary explained that the Supermarket's claim for RM5,000,000 under the heading "loss of business in any event" represents an essential claim for expenses to regain the business, and does not overlap the claim for loss of capital value. In addition, the Supermarket will have to take time to re-build its business. It has to incur advertisement and promotion expenses, and holding costs, while waiting for customers to develop. It has to stay in business. Shelves have to be filled. Perishable foodstuff has to be stocked and when it is no longer fresh, it has to be replaced. Varieties of stocks have to be made available for the customers. Stocks have to be replaced if they cannot be sold by the expiry date.

Low purchase prices of supplies cannot be expected until the Supermarket begins to buy in bulk.

[131] All such expenses to rebuild the Supermarket's clientele and to rebuild its volume of business, at RM20,000,000 to RM21,000,000 over the six years prior to the closure of the affected portion of the Road is conservatively estimated at RM5,000,000. In proportion to the volume of business at RM20,000,000 and RM21,000,000 prior to the closure of the affected portion of the Road, the sum of RM5,000,000 is between 23.8% and 25% of one year's sales. Considering that the Supermarket took 20 years to build up these sales, the Supermarket is expected to take sometime to build up its former business, if at all it can.

[132] The Supermarket's total claim for the sum is specifically set out as follows:

Total loss from November 1996 till September 2003	RM9,844,157
Diff. between market value of premises & sale price	RM1,078,000
After sale of premises, to rent the premises at monthly rent – RM60,676 x 60	RM3,640,560
Rental payable on option to renew tenancy Monthly rent RM39,500 x 60	RM2,370,000
Loss of goodwill or Capital value	RM1,811,000
Loss of business in any event ie, cost to recover lost business	RM5,000,000
Total Loss	RM23,743,157

[133] The learned trial judge has accepted the evidence of the relevant witnesses for the plaintiff. These witnesses including the actuary have been bombarded by way of incisive cross-examination. The learned trial judge has found that the evidence of the actuary in particular and that of the other witnesses who testified for the plaintiff in general have emerged unscathed. I am unable to find any error in the award of the damages by the learned trial judge. There is no justification for appellate interference, except to observe that since UDA, DBKL and the

Government of Malaysia were joint tortfeasors, in public nuisance and additionally, DBKL for breaches of statutory duties, their liability should be apportioned equally.

[134] My learned brothers James Foong Cheng Yuen JCA and Suriyadi bin Halim Omar JCA have read this judgment in draft. We are of the unanimous opinion that the decision of the court below should be upheld in respect of liability. Suriyadi bin Halim Omar JCA also concurred with me in affirming the damages awarded by the learned trial judge.

Conclusion

[135] On the foregoing grounds, the appeals against liability are unanimously dismissed, while the appeals against quantum are dismissed by way of a majority judgment. The learned trial judge's orders on liability and quantum are likewise affirmed. UDA, DBKL and the Government of Malaysia are ordered to bear the damages equally. Costs of these appeals to be paid by the three defendants to the Supermarket. Deposits to the Supermarket on account of taxed costs.